1949

Merrill Holbrook v. Louise Holbrook : Brief of Appellant

Utah Supreme Court

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Case No. 7296

In the Supreme Court
of the State of Utah

MERRILL HOLBROOK,
Defendant and Appellant,

vs.

LOUISE HOLBROOK,
Plaintiff and Respondent.

APPELLANT'S BRIEF

APPEALED FROM THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR DAVIS COUNTY, UTAH.

HONORABLE A. H. ELLETT, JUDGE.

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STATEMENT OF CASE

On the 3rd day of May, 1948 the Second Judicial District Court, in and for Davis County, State of Utah, the Honorable Charles G. Cowley presiding, granted a divorce to the respondent herein against the appellant, and, among other things, ordered the appellant to pay to the respondent the sum of $150.00 per month for the support and maintenance of four minor children, the issue of the marriage between the two, the custody of which children was, by the decree, awarded to the respondent.

On the 11th day of January, 1949 the appellant herein was cited before the court for failure to pay the full amount of said support money. At said hearing on January 11, 1949

Judge A. H. Ellett, temporarily sitting in the Second Judical District presided. The evidence indicated that from the time of the entry of the decree in May of 1948 until the 11th day of January, 1949 the appellant herein had paid to the respondent the sum of approximately $630.00. The court ordered the appellant committed to the county jail for a period of thirty days for contempt unless the appellant paid to the respondent the support money found in arrears in the sum of $645.00.

At the time of the hearing on January 11, 1949 a petition was filed by the appellant herein for the reduction of the support money for the children from $150.00 per month to $80.00 per month on the ground that changed financial conditions on the part of the respondent occurring between the date of the entry of the decree in May of 1948 and the date of the filing of the petition made such reduction equitable. The court declined to hear evidence on this point on the ground that changed conditions in financial circumstances in the mother was not such a changed condition that would under any circumstances warrant a change in the amount of support money payable.

This appeal is taken from the order of the court holding the appellant herein in contempt of court and also from the refusal of the court to consider the appellant's petition for a modification of the decree. The facts as brought out at the hearing will be more fully discussed in relation to the points to which they are applicable.

ASSIGNMENTS OF ERROR

The appellant assigns the following errors as a basis for asking this court for a reversal of the holding of the lower court:

1. The court erred in its finding that the appellant herein had received $435.00 per month during the period between the entry of the divorce decree and the hearing on the contempt procedings.

2. The court erred in holding the appellant herein in contempt for failure to pay the sum of $645.00 in the absence of a finding on the part of the court that the appellant was able to pay such amount.

3. The court erred in holding that changed financial cimcumstances on the part of a mother are not such changed circumstances as may justify the modification of an order for the payment of suport money for minor children.

ARGUMENT

THE COURT ERRED IN ITS FINDING AS TO THE APPELLANT'S EARNINGS.

On page 51 of the record the court stated: "It appears you received four hundred thirty-five dollars a month less the expense on the house * * * " This statement is in direct variance with the evidence presented at the hearing. It was stipulated between the parties that the appellant herein earned the sum of $300.00 per month. (Tr. 14). The court evidently based its statement that the defendant received $435.00

per month on the fact that the evidence shows that the home, which had formerly belonged to the parties hereto, was being rented for the sum of $135.00 per month. This statement, however, overlooks entirely the fact which appears in the evidence (Tr. 43) that both of the parties hereto conveyed this home to the appellant's mother and that she in turn borrowed $7500.00 on this home and turned it over to the appellant in order that he might pay to the respondent the cash settlement ordered at the time the divorce decree was entered in May, 1948. The evidence shows that this home still belongs to the appellant's mother and that while the rent payments were made on said home at the appellant's place of business he received none of it. The appellant specifically testified that he had received no money whatsoever from the rental of this house. The respondent introduced no evidence whatever to contradict this statement. The finding of the court, therefore, that the appellant received the sum of $435.00 is not only not supported by the evidence but is in direct contradiction to the evidence in the record on this point.

THE COURT ERRED IN ORDERING THE APPELLANT COMMITTED FOR CONTEMPT IN THE ABSENCE OF A FINDING AS TO HIS ABILITY TO PAY.

There were no formal findings at all entered following the hearing of January 11, 1949. There is in the record on page 123 a minute entry signed by the court wherein the court states: "That the defendant was able to have paid the sums assessed against him according to the decree and that he wilfully

neglected and failed to pay the sum of $645.00 of the sum of assessed." Whether or not this minute entry can be considered as a formal finding counsel has strong doubts. It has been held by this court in a number of cases that an order of contempt cannot be sustained in the absence of findings.

Assuming, however, that the findings as entered are proper as to form they are not sufficient to support the contempt order of the court. There is no finding, and if there were such a finding there is no evidence to support it, that the defendant at the time of the hearing on January 11, 1949 had the ability to pay the $645.00 that he was ordered to pay. The defendant specifically denied that he had the ability to pay this amount at the time and no proof was entered by respondent that he was able to do so.

Contempt generally falls into two classes, punitive and purposive contempt. Punitive contempt is designed to punish a person for some act or omission which constitutes contempt of the court's order. Purposive contempt on the other hand is designed to compel the individual to comply with an order of the court. This is clearly a purposive contempt. The court ordered the appellant committed to jail unless he made payment of the sum of $645.00. If the contempt had been punitive he would have been ordered to jail regardless of his payment or if payment had been ordered it would have been a payment in the nature of a fine made to the state and not a payment to the other party in the case. Where a contempt is purposive it is clear that the person ordered to comply with the directive of the court must be presently able to comply. This matter is discussed at length by the Supreme Court of the State of

Washington in the case of *Snook v. Snook,* 188 *Pac.* 502. There the court stated:

> "This is not a criminal contempt proceeding. It is a civil contempt proceding, the object of which is not to punish the appellant, but to coerce him to pay the money in satisfaction of the alimony portion of the decree of divorce. 6 R. C. L. 490. It may be that appellant's past failure to make the payments is of such inexcusable character that he could be punished by fine or imprisonment in a criminal contempt proceeding, regardless of his present inability to make payment thereof; but, if so, such punishment would have to be in the nature of a fine of a fixed amount payable to the state, or to be satisfied by imprisonment at the rate of a fixed sum for each day of imprisonment, or such punishment would have to be imprisonment for a fixed term. Such is not the nature of the judgment sought or rendered in this proceeding. In a contempt proceeding of this character, the object of which is to coerce the payment of money, the lack of ability to pay on the part of the defendant is always a complete defense against enforcing payment from the defendant by imprisonment. In harmony with the law on that subject in most of the jurisdictions of this country, this court has repeatedly so held. Holcomb vs. Holcomb, 53 Wash. 611, 102 Pac. 653; Bayle v. Boyle, 74 Wash. 529, 133 Pac. 1009; Crombie v. Crombie, 88 Wash. 520, 153 Pac. 306; Smiley v. Smiley, 99 Wash. 577, 169 Pac. 962; Wells v. Wells, 99 Wash. 492, L.R.A. 1918C, 291, 169 Pac. 970.
>
> We conclude that appellant's inability to pay the money as directed by the judgment from which he has appealed sufficiently appears to call for a reversal of the judgment. It is so ordered."

The Utah case of *Watson v. Watson,* 72 *Ut.* 218; 269 *Pac.* 775 appears to be directly in point, the only distinction between the two cases being that in Watson v. Watson the defendant was ordered committed until he made payment of a certain amount where in this case the defendant is ordered committed for a definite term unless he makes such payment. The finding of the court in Watson v. Watson as in this case, if we are to consider the minute entry as a finding, was to the effect that the defendant had earned sufficient money to pay the installments at the time they were due. Neither in the Watson case or in this case, however, was there any finding of a present ability on the part of the defendant to make payment. The language of the court in the Watson case was as follows:

> "The order committing the defendant to imprisonment until he pays $600 delinquent alimony is assailed upon the ground that there is no sufficient proof or finding that the defendant had the ability to make the payment in default of which he was to be imprisoned. The finding of the court on this subject was that since the entry of the decree awarding alimony 'defendant has earned sufficient wages to pay said alimony, but that defendant has willfully refused to pay said alimony, and this court finds that said defendant is in contempt of court for willfully refusing to pay said alimony.' There was satisfactory and sufficient evidence to support the above finding.
> (1) The particular question here, however, arises upon the contention of defendant that the finding made by the court does not warrant or support the judgment of imprisonment which was entered against him. It is argued that a finding of present ability to comply with an order is an essential prerequisite to an order

> that the delinquent be imprisoned until he does comply. In support thereof the following cases are cited: Ex parte Silvia, 123 Cal. 293, 55 P. 988, 69 Am. St. Rep. 58; In re Cowden, 139 Cal. 244, 83 P. 156; Lutz v. District Court, 29 Nev. 152, 86 P. 445; Ex parte Hamberg, 37 Idaho, 550, 217 P. 264—to which may be added our own decision in Hillyard v. District Court (Utah) 249 P. 806.
>
> The judgments considered in the cited cases were all coercive in form and purpose and intended to compel the payment of money by the delinquent, by an order of indefinite imprisonment until the payment was made. To support such a judgment in contempt it is clear that it should first appear that the act sought to be coerced was yet within the power of the person proceeded against to perform. It would be repugnant to reason and futile to order a person imprisoned until he did some particular thing, unless he had the present ability to do it."

The court evidently hoped to avoid the effect of the Watson case by making the term of imprisonment for a definite term to be suspended upon the payment of $645.00 to the clerk of the court without stating that it was for the benefit of the respondent herein. However, the evidence clearly indicates and the court stated in its minute entry that the $645.00 was the amount unpaid on the alimony and therefore regardless of what the language of the court may have been it is obvious the effect of the order was that the appellant herein must pay the amount in arrears in alimony or be committed to jail. It is very clearly a purposive contempt and directly within the provisions of Watson v. Watson.

THE COURT ERRED IN HOLDING THAT CHANGED FINANCIAL CIRCUMSTANCES OF THE WIFE IS NOT SUCH A CHANGE IN CONDITIONS AS TO BE CONSIDERED IN A PETITION FOR MODIFICATION OF THE DECREE.

Prior to the hearing on January 11, 1949 the appellant herein filed a cross-petition praying that the support money payments be reduced from $150.00 per month to $80.00 per month. The change in circumstances as alleged in this petition were that since the entry of the divorce decree the respondent herein had secured employment and was earning approximately $175.00 per month. When the appellant attempted to introduce evidence regarding the change in financial circumstances of the wife the court refused to hear it stating in effect that no change in the financial circumstances of the wife resulting from her employment should be considered in a petition for reduction of support but that the only change in circumstances that could be considered was the change in the income of the husband (Tr. 52). Had the court considered the evidence as to the wife's earnings and then found that such change in circumstances was not sufficient to justify a modification of the decree, it may be that such a finding would have been within the discretion of the court. However, the court in this case found that a change in the financial circumstances of the wife resulting from her employment is not a matter that should be considered at all and the court refused to let counsel for the appellant pursue the matter (Tr. 23).

There is evidence in the record, however, which indicates that the respondent herein was not employed and had no income at the time of the divorce decree. The evidence further indicates that at the time of the hearing she was and had for some months been employed at a salary of approximately $170.00 to $175.00 per month. Therefore, if the husband were to pay $150.00 per month out of his salary for the support of the wife and children, the wife, to maintain her household, would have a total income of approximately $320.00 as aginst $150.00 for the husband. When this is considered in connection with the fact that the husband turned over to the wife enough money to buy a home, which he had to borrow, and the further fact that the husband was obligated to pay in addition to this amount approximately $5000.00 (T. 41) in debts contractly jointly by himself and his wife prior to the time of the divorce it was certainly a situation that should have been considered by the court.

Counsel is aware that the question of whether the employment of a wife folowing the entry of a divorce decree is such a change of circumstances as will warrant a modification of a decree an open question in this state. It is clear, as the court stated into the record (Tr. 23) that the re-marriage of the wife and the financial condition of the second husband have no bearing upon the amount the father must pay to support the children. However, a different circumstance exists where the wife has means of her own. In the case of Rockwood v. Rockwood, 236 Pac. 457, the court said in regard to the proof of the father: "He has not shown that the mother of the children is able to support them and even

if he had it is not clear that such fact would alter the case." As stated above the question as to whether or not the mother's ability acquired subsequently to the entry of the decree to support the children is such a change in circumstances as to warrant a modification is still an open question in this state. It appears to counsel, however, that a reading of our statute forces one to the conclusion that both the financial ability of the mother and the father should be taken into consideration in determining amounts payable by the father for the support of the children. *Section* 40-3-5, *Utah Code Annotated,* 1943, provides in part:

> " * * * Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper."

In the case of *Morris v. Morris,* (*Neb.*) 290 *N. W.* 720 the court stated:

> "The subsequent employment of plaintiff is a circumstance that may justify a modification of the decree as a matter of judicial discretion, if there are appealing equities in defendant's situation."

In the case of *Wassung v. Wassung* (*Neb.*) 286 *N. W.* 340 the court stated:

> "The reduction in defendant's wages and the employment of the plaintiff are changes in the circumstances of the parties that justify a prospective modification of this decree under the power granted to the court in Section 42-312 Comp. St. 1929, and section 42-324, Comp. St. Supp. 1937."

In each of the following cases from varying jurisdictions the employment of the wife subsequent to the entry of the divorce decree was considered as the sole factor or as a major factor in conjunction with other circumstances to justify a modification of the decree ordering payment of support money for minor children: *Lines v. Lines,* (*S.D.*)9 *N. W.* (2*d*) 705; *Sullivan v. Sullivan* (*Neb.*), 4 *N. W.* (2*d*) 919; *Caprio v. Caprio* (*N. Y.*) 8 *N. Y. S.* (2*d*) 205; *Kavanaugh v. Kavanaugh,* (*N. J.*) 35 *Atl.* (2*d*) 691.

As was stated above had the court considered the employment of the wife and then determined in its discretion that the facts still did not warrant a modification of the decree it may well be that such discretion would not be upset. However, in this case the appellant was not even allowed to go into that matter as the court held that as a matter of law such a change in circumstances was not such as could be considered as a basis for a modification. The order for the payment of $150.00 per month support money for the children was reached in this case upon the basis of a stipulation. It was reached not because of the fact that the husband could afford to pay $150.00 out of his $300.00 earnings in view of the financial obligations which he had but because it was obvious that his wife having no other income could not support herself and the children on a lesser amount. However, when the wife secured employment a different situation existed. While it is true that the pressing situation in which the husband found himself has not been altered since the entry of the original divorce decree the overall financial picture of the husband, wife and the children has been considerably altered

to such an extent that some relief to the husband in view of the finacial burdens which he had to bear was obviously justified.

CONCLUSION

The appellant urges that this matter should be returned to the district court with instructions to vacate the contempt order and with the direction to order a reduction in the amount of the support money payable by the husband in accordance with the prayer of the husband's petition.

Respectfully submitted,

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